

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

RUDOLPH V. BAILEY, SR.,)	
Plaintiff,)	
Appellant,)	
v.)	C.A. No. 05A-04-006-PLA
)	
ACME/ASCO/ALBERTSON'S)	
INC.,)	
Defendant,)	
Appellee.)	

Submitted: January 13, 2006
Decided: February 21, 2006

UPON APPEAL FROM A DECISION FROM THE
COURT OF COMMON PLEAS. **AFFIRMED IN PART.**
REVERSED IN PART. REMANDED.

Rudolph V. Bailey, Sr., *pro se*.

Thomas S. Bouchelle, Esquire, attorney for Defendant/Appellee.

ABLEMAN, JUDGE

This is an appeal from a decision of the Court of Common Pleas granting Defendant's Motion to Dismiss and denying Plaintiff's Motion for Default Judgment and Motion for Sanctions. It appears to this Court that the trial court misapprehended the facts in finding that service of process had not been effected by the sheriff and that the complaint had been filed against improper parties. The other claims on appeal appear to be without merit. Accordingly, the decision of the trial court is **AFFIRMED IN PART, REVERSED IN PART** and **REMANDED** for further proceedings consistent with this Opinion.

Statement of Facts

Plaintiff Rudolph Bailey ("Bailey") purchased apple juice on March 10, 2004 from the Acme at Fox Run Shopping Center. After consuming the juice, Bailey became ill. Bailey alleges in his complaint that the apple juice was subsequently found to contain mold due to improper refrigeration.

Bailey filed a complaint against Acme/Asco/Albertson's Inc. in the Court of Common Pleas on December 15, 2004, seeking damages for his pain and suffering. Included with the complaint is a Praecipe directing the Clerk of the Court of Common Pleas to issue a writ of summons and direct the Sheriff to serve Acme Supermarket. On the Praecipe Plaintiff listed the address of the Acme where he had purchased the apple juice. The Sheriff's

Return was filed with the Court of Common Pleas January 21, 2005 indicating that service had been effected by leaving a copy of the summons and complaint with the Acme store manager on January 13, 2005.

On February 10, 2005 Plaintiff moved for default judgment because Defendant had failed to file an Answer within twenty days.¹ One day later, however, an attorney for Acme Markets Albertson's Inc. entered an appearance. Five days later, Acme filed an Answer, a Response to the Motion for Default Judgment, and a Motion to Dismiss, arguing that service was insufficient and that the action had been filed against a nonexistent party. Bailey responded with a Motion for Sanctions, claiming that Defendant's attorney had violated Rule 11 of the Civil Rules of the Court of Common Pleas when counsel authorized another attorney in his office to sign his name to the Entry of Appearance. Counsel apparently did this because he had recently suffered a death in his family.

The Court of Common Pleas granted Defendant's motion to dismiss, holding that Plaintiff did not serve process through the Sheriff or by special process server. As such, that court found the service of process insufficient. The Court also denied Plaintiff's Motion for Default Judgment, holding that the late entry by Defendant's counsel was reasonable neglect in light of the

¹ Civil Rule 12(a).

circumstances, and that it had not resulted in any prejudice to Plaintiff. The trial court additionally denied the request for sanctions, finding that there was no evidence of bad faith or attempt to delay or mislead the Court or Bailey.

Standard of Review

In reviewing appeals from the Court of Common Pleas, the Superior Court sits as an intermediate appellate court, and as such, its function is the same as that of the Supreme Court.² Therefore, findings of law are reviewed *de novo* to determine whether the trial court erred in formulating or applying legal precepts.³ With regard to findings of fact, the Superior Court has a duty to review the sufficiency of the evidence and to test the propriety of the findings below. If the findings of the trial court are sufficiently supported by the record and are the product of an orderly and logical deductive process, the Superior Court must accept them. The Superior Court is only free to make findings of fact that contradict those of the Trial Judge when the record reveals that the findings below are clearly wrong and the Appellate Judge is convinced that a mistake has been made that, in justice, must be corrected.⁴

² See, e.g., *Baker v. Connell*, 488 A.2d 1303, 1309 (Del. 1985); *State v. Richards*, 1998 WL 732960 (Del. Super.); *State v. Huss*, 1993 WL 603365 (Del. Super.).

³ *Downs v. State*, 570 A.2d 1142, 1144 (Del. 1990).

⁴ *Barks v. Herzberg*, 206 A.2d 507 (Del. 1965).

The Law

As the Court of Common Pleas acknowledged in its opinion below, a Sheriff's return is *prima facie* proof of proper service.⁵ Strong and convincing proof is therefore required to rebut that presumption.⁶ Methods for service of process against a corporation are specified in both Rule 4(f)(III) and in 8 *Del. C. § 321(a)* and provide that service on a corporation may be accomplished by delivering a copy of the summons and complaint to any officer, managing or general agent, or by leaving the copy at the registered office or other place of business of the corporation. The general purpose of these process rules is to give notice that will "in the nature of things bring the attention of the corporation to the commencement of proceedings against it."⁷ Notice is also the primary concern in naming the parties against whom action is being taken. In order for a variance in name to be considered material, it must mislead a party to his prejudice.⁸

The objective of legal procedure is the prompt determination of issues on their merits. While litigants may not disregard the processes of the Court, at times a failure to act may constitute excusable neglect.⁹ Excusable

⁵ *Alston v. DiPasquale*, 2001 WL 34083824 (Del. Super.).

⁶ *Cohen v. Brandywine Raceway Ass'n*, 238 A.2d 320 (Del. Super. Ct. 1968).

⁷ *Keith v. Melvin L. Joseph Constr. Co.*, 451 A.2d 842, 845 (Del. Super. Ct. 1982).

⁸ *Hoffmann v. Corrado*, 1984 WL 484509 (Del. Super.).

⁹ *Cohen*, 238 A.2d at 325.

neglect has been described as that neglect that might have been the act of a reasonably prudent person under the circumstances.¹⁰

The Court also maintains an “inherent power” to sanction parties to litigation where bad faith conduct exists. Such power, “exercised with great restraint,”¹¹ permits the Court to deter abusive litigation and protect the integrity of the judicial process.¹²

Discussion

The Court of Common Pleas improperly granted Defendant’s Motion to Dismiss on the ground that Mr. Bailey personally took a copy of the complaint to the Acme store at Fox Run in an attempt to effect service. This holding is clearly erroneous. Attached to Bailey’s complaint is a Praecipe directing the Clerk of the Court to issue a summons to the Sheriff. This was apparently done as evidenced by the docketed Sheriff’s Return indicating that service had been completed. Defendant’s conclusory arguments that the service was improper are insufficient to rebut the presumption in favor of proper service. Additionally, while it is true that Acme/Asco/Albertson’s Inc. is a non-existent entity, the caption was sufficient to provide notice to

¹⁰ *Id.*

¹¹ *Gilmour v. PEP Modular Computers, Inc.*, 1995 WL 791001 (Del. Super.). Indeed, the Court of Chancery has held that, in awarding attorney’s fees for bad faith litigation conduct, “a higher or more stringent standard of proof [is required].” *Arbitrium (Cayman Islands) Handels AG v. Johnston*, 705 A.2d 225, 232 (Del. Ch. 1997).

¹² *Montgomery Cellular Holding Co. Inc. v. Dobler*, 2005 WL 1936157 (Del. Supr.).

Acme such that Acme entered an appearance in this case. Therefore, because Defendant has not been prejudiced, the service is sufficient to maintain Plaintiff's cause of action.

The trial court properly rejected Plaintiff's Motion for Default Judgment. Defendant's few days delay in entering an appearance and answering the complaint due to a death in the family constitutes excusable neglect under the circumstances. The Court has extended Mr. Bailey some leniency in this litigation and believes that Defendant is likewise entitled.

Finally, it is clear to this Court that there is nothing in the record to indicate that counsel for Defendant has acted in bad faith to cause delay unnecessarily, commit a fraud, or confuse or harass the plaintiff. The trial court therefore properly denied Plaintiff's Motion for Sanctions.

Accordingly, for the foregoing reasons the decision of the trial court is hereby **AFFIRMED IN PART, REVERSED IN PART** and **REMANDED** for further proceedings consistent with this opinion.

IT IS SO ORDERED.

PEGGY L. ABLEMAN, JUDGE

Original to Prothonotary
cc: Rudolph V. Bailey, Sr.
Thomas S. Bouchelle, Esquire